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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 23 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an IT consulting and solutions company.[1] It seeks to employ the beneficiary permanently in the United States as a senior web developer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750,[2] Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner had not established that the position required an individual with an advanced degree or its equivalent, and appears to state that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a Master's degree in English, CIS or Computer Science.[3]

The record shows that the appeal is timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

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[1] With the initial petition, the petitioner's general counsel submitted a G-28 dated June 29, 2007 that is signed by the beneficiary. The record contains a second G-28 dated May 28, 2009, also signed by the beneficiary. The regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B) permits an affected party to "be represented by an attorney or representative" but specifically states that this "does not include the beneficiary of a visa petition." There is no regulatory provision that would allow USCIS to recognize the appearance of an attorney who does not represent the affected party or to consider a brief that was provided by someone who does not represent the affected party. In the instant matter, the AAO views the petition as self-represented.

[2] After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

[3] The AAO will withdraw this part of the director's decision, as the record is clear that the abbreviation ENGG signifies the field of Engineering, rather than English. The director also initially indicated in his decision that the petitioner was seeking classification under the EB3 visa preference of professional or skilled worker, which is also in error. The AAO will withdraw this statement as well.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[4]

On appeal, the petitioner submits an additional educational evaluation report dated June 1, 2009 written by Dr. [redacted], Associate Professor, Pace University. In his evaluation, Dr. [redacted] examines the position of senior web designer and states that the industry standard and business necessity would necessitate either a master's degree with two years of work experience or a bachelor's degree with at least five years of work experience. Dr. [redacted] notes that at least one year of the prior work experience must have involved developing dynamic sites using three-tiered architecture and the applicant must have knowledge of relational database management system using ASP and SQL Server. Dr. [redacted] also found that the beneficiary was qualified for the position as he completed a four year bachelor of technology degree in electronic and communication engineering and that detailed letters of work verification document more than five years of post secondary employment in relevant fields. Dr. [redacted] further states that the beneficiary's Bachelor of Technology degree is the equivalent of a U.S. baccalaureate degree in electronic engineering. Counsel resubmits the beneficiary's Statements of [redacted] from Mahatma Gandhi University, and copies of five letters of work verification that refer to the beneficiary's previous work experience.

Requirements of Proffered Position for An Individual with an Advanced Degree

In his decision, the director appears to state that the proffered position does not require an individual with an advanced degree because the Form ETA 750 requires a master's degree in English, CIS or computer science. As stated previously, the AAO withdraws the director's statements with regard to the proffered position requiring a Master's degree in English.

Further the record reflects that the petitioner submitted its I-140 petition with a request for a duplicate ETA 750 as the original approved labor certificate was not received by mail. The record further reflects that either the petitioner or a Texas Service Center employee checked the DOL ETA website with regard to the status of the petitioner's ETA-750 and placed a printout dated June 29, 2007 with the file materials showing that the petitioner's ETA-750 had been certified. The record does not contain a complete copy of the certified ETA-750. A minimally filled out ETA-750 form is found in the record that indicates the form was received by the DOL on July 31, 2003. Part A has a notation at the bottom "Duplicate Labor Cert certified by the Department of Labor #145 05/007/09."

While the record is incomplete with regard to the claimed contents of the instant ETA Form 750, the limited information on the copy of the ETA Form 750 found in the record reflects that the ETA Form 750 indicates that a master's degree in engineering is required.

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[4] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following:

> (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **The job offer portion of the individual labor certification**, Schedule A application, or Pilot Program application **must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability**.

(Bold emphasis added.)

Based on the copy of Form-750, Part A, found in the record, the proffered position does require a Master's degree in engineering, CIS or computer science. The AAO would also accept Dr. [redacted] evaluation that the increased complexity of a senior web developer position requires a master's degree or its equivalent. Therefore the AAO finds that the petitioner has established that the proffered position does require an individual with an advanced degree or its equivalent.

Eligibility for the Classification Sought

As noted above, the ETA 750 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone

unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Askkenazy Property Management Corp.* 817 F. 2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). substantive rights nor provide procedures upon which [they] may rely.")

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at 6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[5] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900.

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree." For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of

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[5] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Compare* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability").

The beneficiary possesses a foreign four-year bachelor's of technology degree under electronics and communication branch from Mahatma Gandhi University as of November 1995. The record contains copies of the beneficiary's Statements of [redacted] for a four year program of studies. Thus the beneficiary does qualify for preference visa classification under section 203(b)(2) of the Act as he does have the minimum level of education required for the equivalent of an advanced degree.

We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the*

> *certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

As stated previously, the record reflects that the petitioner submitted its I-140 petition with a request for a duplicate ETA 750 as the original approved labor certificate was not received by mail. The record further reflects that either the petitioner or a Texas Service Center employee checked the DOL ETA website with regard to the status of the petitioner's ETA 750 and placed a printout dated June 29, 2007 with the file materials showing that the petitioner's ETA 750 had been certified. The record does not contain a complete copy of the certified ETA 750. A minimally filled out ETA 750 form is found in the record that indicates the form was received by the DOL on July 31, 2003. Part A has a notation at the bottom "Duplicate Labor Cert certified by the Department of Labor #145 05/007/09."

While the copy of Part A contains information with regard to the minimum educational requirements, Part B of the ETA-750 contains no information on Section 11, Part B, Names and Addresses of Schools, Colleges and Universities Attended, or Section 15, work experience. Thus, the AAO cannot truly examine the plain language of the entire labor certification.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education:
Grade School: 8
High School: 4
College: 6
College Degree Required: Master's *
Major Field of Study: Engg, CIS, Comp Sci
Experience:
Job Offered: 2 in the proffered position or
Two years in a related occupation

Block 15: (Blank)

The beneficiary does have a "United States baccalaureate degree or a foreign equivalent degree," and, thus, does qualify for preference visa classification under section 203(b)(2) of the Act. However, the certified labor certification indicates six years of college, and a Master's degree are also required. The beneficiary does not possess this level of education. If the petitioner indicated the alternate minimum academic credential of a baccalaureate degree in Engineering, CIS or computer Science, with five years of work experience, this information is not indicated on the copy of the ETA 750 found in the record.

Based on the petitioner's apparent requirement of a Master's degree in one of the stipulated files, and no further explanation of any alternate educational level or work experience, the beneficiary does not meet the job requirements on the labor certification.[6] For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

Beyond the decision of the director, the AAO notes that the petitioner provided scant evidence with regard to its ability to pay the proffered wage as of the October 23, 2003 priority date.[7] An application or petition that fails to comply with the technical requirements of the law may be denied

[6] Even if the petitioner indicated the alternate educational credential of a baccalaureate degree and five years of work experience on Part A, Part B contains no further information as to the beneficiary's previous education or work experience. As such, the petition must be denied.

[7] Thus, even if the original beneficiary had not adjusted his status prior to the filing of the instant petition, the petitioner may not have established that the instant petition was approvable.

by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis). For illustrative purposes, the AAO will briefly examine the issue of the petitioner's ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, based on the copy of the Form ETA 750 in the record, the form was accepted on October 23, 2003. The proffered wage as stated on the Form ETA 750 is $70,000 per year.

With the instant petition, the petitioner submitted a document entitled "Financial Statements, March 31, 2006 and 2005 with Independent Auditors' Report." This document is prepared by [redacted] New Brunswick, New Jersey. The AAO notes that the auditors indicate that they audited the petitioner's financial statement for the year ending on March 31, 2006, and that the 2005 statements of income, retained earnings and cash flow were reviewed rather than audited. The petitioner also submitted a financial statement dated July 20, 2004 prepared by [redacted] P.C. This report is a compiled financial balance sheet and statement of operations.

The AAO notes that in a cover letter dated June 29, 2007, [redacted] the petitioner's CFO, notes that the petitioner's 2002 sales were almost $7,400,000; that in fiscal year 2003, the

petitioner's revenue exceeded $18,000,000; in fiscal year 2004, the revenue exceeded $38,000,000;[8] and that for 2005, the petitioner's revenue was $56,000,000. However, the petitioner submits no evidence, such as federal tax returns, to further substantiate these assertions. The petitioner's general counsel repeats these figures in a cover letter that accompanies the I-140 petition. The AAO notes that the assertions of the petitioner or of counsel, do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Based on the audited financial statement for 2006, as of 2006, the petitioner is structured as an S corporation. Its business structure from tax years 2003 through 2005 is not established in the record. On the petition, the petitioner claimed to have been established in 1996 and to currently employ 800 workers. The petitioner claims a gross annual income of $56,000,000 on the I-140 petition.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The petitioner submitted its financial statements for 2004, 2005, and 2006. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The AAO notes that the petitioner's 2006 financial statement is audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. However, the unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied the 2004 financial statement makes clear that this report were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The auditors' report that accompanied the 2005 balance sheets and statements makes clear that the 2005 financial report was produced pursuant to a review. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. In

[8] The AAO notes that the petitioner's compiled financial statement for 2004 indicates revenue of $18,051.236, with a net income of -$169,069 for fiscal year 2004.

either case, the unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted two pay stubs for May 5, 2007 to June 1, 2007 that indicate the petitioner paid the beneficiary an hourly wage of $31.25 during this month and indicated the beneficiary had been paid year-to-date wages of $28,750 as of June 1, 2007. Thus the petitioner has not established that it employed and paid the beneficiary the full proffered wage of $70,000 during any relevant timeframe including the period from the priority date in 2003 or subsequently. Therefore the petitioner would have to establish its ability to pay the entire proffered wage in tax years 2003 to 2005, and the difference between actual wages and the proffered wage in tax year 2006 and 2007.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of

> accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[9] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

As previously noted, the only evidence submitted to the record with regard to the petitioner's ability to pay the proffered wage is its audited financial statement for 2006, its reviewed financial statement for 2005, and its compiled financial statement for 2004. As previously discussed, the petitioner's reviewed and compiled financial statements are not considered sufficient to establish its ability to pay the difference between any wages paid to the beneficiary and the proffered wage in 2004 and 2005. Based on the lack of further evidence described at 8 C.F.R. § 204.5(g)(2), the AAO cannot further examine the petitioner's net income or net current assets. Thus, the petitioner cannot establish its ability to pay the proffered wage as of the 2003 priority date or subsequently through tax year 2007.

The AAO also notes that the petitioner has filed multiple employment-based petitions. USCIS computer records indicate that the petitioner had filed some 3,681 petitions, predominantly I-129 H-

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[9] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

1B petitions as of July 2010. In 2010 alone, the petitioner had filed 203 petitions, while in tax year 2009, the petitioner filed some 353 petitions. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

With regard to the 353 new petitions filed in 2009, if all I-129 or I-140 beneficiaries were paid wages similar to those proffered to the beneficiary, the petitioner would require an additional $21,180,000 in new income to pay for these new employees. With regard to the additional new 203 petitions filed from January to July 2010, the petitioner would require an additional $14,210,000 in new revenue to pay wages similar to the $60,000 salary offered to the beneficiary.[10] The record does not establish that the petitioner has the ability to pay the proffered wages for all pending beneficiaries during the relevant period of time in question. Thus, the petitioner has not established its ability to pay the proffered wage.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has significant gross revenue based on the audited financial statements during tax year 2006. However, the record is devoid of any other evidence as to the

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[10] This sum represents approximately 203 new petitions filed in 2010 multiplied by the proffered wage of $70,000.

petitioner's ability to pay the proffered wage in any other year during the period of time from 2003 to the present. Beyond the petitioner's 2006 audited financial statement and the assertions of counsel and the petitioner's officer with regard to the petitioner's earlier gross profits, the record contains no further evidence or information on any other aspect of the petitioner's financial viability. The record contains no further discussion or information on issues such as officer compensation, longevity of business, and/or the petitioner's reputation within the IT business community. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage as of 2003 and onward.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.